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In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND,
INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Executive Order No. 12,404, which limits participation in the Combined Federal Campaign to traditional health and welfare charities and thus excludes legal advocacy groups, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Sierra Club Legal Defense Fund, Inc.; the Puerto Rican Legal Defense and Education Fund, Inc.; the Federally Employed Women Legal and Education Fund, Inc.; the Indian Law Resource Center; the Lawyers' Committee for Civil Rights Under Law; and the Natural Resources Defense Council, Inc., are respondents.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-76a) is reported at 727 F.2d 1247. The opinion of the district court (Pet. App. 84a-97a) is reported at 567 F. Supp. 401.

JURISDICTION

The judgment of the court of appeals (Pet. App. 77a-78a) was entered on February 17, 1984. A petition for rehearing was denied on April 30, 1984 (Pet. App. 79a-83a). On July 18, 1984, Justice White extended the time within which to file a petition for a writ of certiorari to and including August 28, 1984. The petition was filed on that date and was granted on October 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

EXECUTIVE ORDER INVOLVED

Executive Order No. 12,404, 3 C.F.R. 151, provides in pertinent part:

> By the authority vested in me as President by the Constitution of the United States of America, and in order to lessen the burdens of Government and of local communities in meeting needs of human health and welfare, it is hereby ordered as follows:
>
> Section 1. Executive Order No. 12353 of March 23, 1982, is amended as follows:
>
> (a) By deleting Section 1 of that Order and inserting in its place the following provision:
>
> "Section 1. The Director of the Office of Personnel Management shall make arrangements for voluntary health and welfare agencies to solicit contributions from Federal employees and members of the uniformed services at their places of employment or duty. These arrangements shall take the form of an annual Combined Federal Campaign in which eligible voluntary agencies are authorized to take part."
>
> (b) In Section 2 insert "(a)" after the Section number and add the following new subsection after the existing provision:
>
> "(b) In establishing those criteria [for determining the eligibility of voluntary agencies that may participate in each of the annual Combined Federal Campaigns], the Director shall be guided by the following principles and policies:
>
> "(1) The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare.
>
> "(2) To meet these objectives, eligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. * * * Such services must directly benefit human beings * * *. Such services must consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.
>
> "(3) Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign."

STATEMENT

1. Background Of The Combined Federal Campaign

The federal government annually solicits more than $100 million in charitable contributions from its civilian and military employees through a government-wide charitable fund-raising drive known as the Combined Federal Campaign. The Campaign is conducted by volunteer federal employees, in the federal workplace, on government time, and largely at government expense. 5 C.F.R. 950.103(d) and (e). All organizations that wish to re-

ceive funds solicited in the federal workplace must do so within the framework of the Campaign.[1] No group, including those that receive contributions through the Campaign, may itself engage in any on-the-job solicitation of federal employees. See 5 C.F.R. 950.507(a).

Prior to 1957, there were no government-wide rules governing solicitation by charitable organizations in the federal workplace. Some organizations had access to parts of the federal workplace on an ad hoc basis. In some federal facilities managers did not permit any solicitation; in others, there were no restrictions, and solicitations occurred so frequently that they disrupted the workplace. Pet. App. 3a; J.A. 308-309. In facilities in which solicitations were permitted, "it was not uncommon for a collection to be taken up each week on behalf of one charity or another" (*id.* at 309), often by "the passing around of an empty coffee can" (*id.* at 308). Federal officials in some facilities "were besieged by dozens of agencies seeking endorsements and the privilege of soliciting employees on the job." U.S. Civil Service Comm'n, *Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Agencies* § 1.1 (1977) [hereinafter cited as *Manual on Fund-Raising Within the Federal Service*].[2]

The initial attempt to bring some order to these fund-raising activities came in 1957, when President Eisenhower issued Executive Order No. 10,728, 3 C.F.R. 387

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[1] Locations in which there are fewer than 200 federal employees are not required to participate in the Campaign, but may make alternative arrangements. 5 C.F.R. 950.507(d).

[2] Until recently the Campaign was conducted pursuant to the provisions of the *Manual on Fund-Raising Within the Federal Service*, originally issued in 1963. Beginning in 1982, the Office of Personnel Management has promulgated regulations implementing the executive orders governing the Campaign. See page 9 note 9, *infra*.

We are lodging a copy of the *Manual on Fund-Raising Within the Federal Service* with the Clerk of the Court and providing copies to counsel for respondents and amici.

(1954-1958 comp.). That executive order established general procedures and standards for "a uniform fund-raising program of true voluntary giving" (*id.* § 1(a)) applicable to all executive departments and agencies, including the armed forces. The executive order directed that there be no more than three charitable solicitations annually (*id.* § 1(b)); established a system for approving requests from national "voluntary health and welfare" agencies for participation in the program (*id.* §§ 1(c), 3(d)); and directed that federal employees "be subjected to a minimum of disturbance" while on duty (*id.* § 1(d)). Each participating charitable organization was to be given the opportunity to inform potential givers of its purposes and operations, and an employee could choose the organization that would receive his gift (*id.* § 1(f) and (h)). The executive order established the President's Committee on Fund-Raising Within the Federal Service, which was responsible for reviewing and modifying the fund-raising program (*id.* §§ 2, 3). The Committee also was given the task of reviewing requests for participation in the drive and assigning the appropriate solicitation periods to organizations found to be eligible for participation (*id.* § 3(d)).

In 1961, President Kennedy laid the foundation for the program that came to be known as the Combined Federal Campaign. He abolished the Committee on Fund-Raising Within the Federal Service and revoked the 1957 executive order. In place of the old executive order President Kennedy issued Executive Order No. 10,927, 3 C.F.R. 454 (1959-1963 comp.). Like the 1957 directive, the 1961 order provided that giving must be truly voluntary, that specific solicitation periods were to be designated, and that there should be no more than three solicitations annually (*id.* § 2(b)).[3] Unlike the

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[3] Within a few years of the issuance of the 1961 executive order, federal officials determined that Campaign activities should be consolidated into a single solicitation drive, normally conducted during a six-week period in the fall. See 5 C.F.R. 950.103(b); *Combined Federal Campaign: Hearings Before the Subcomm. on*

1957 order, the 1961 order did not set out additional operating guidelines, but instead directed the Chairman of the Civil Service Commission to "make arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations" (*id.* § 2(a)).[4]

For the next 20 years, the provision for participation in the Campaign by "national voluntary health and welfare agencies and such other[s] * * * as may be appropriate" caused little controversy. That provision was understood by all concerned as limiting participation in the Campaign to those charities that engaged in medical research or that provided traditional health and welfare services directly to needy people. J.A. 309-310.[5] This

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the Civil Service of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 11-12 (1979) (statement of Alan K. Campbell, Director, Office of Personnel Management).

[4] These duties were transferred to the Director of the Office of Personnel Management when the Civil Service Commission was abolished in 1978.

[5] The Director of the Office of Personnel Management described the history of the Campaign as follows:

> Everyone seemed to understand that the Combined Federal Campaign was intended to support the traditional kinds of charities that undertake research into the causes and cures of dread diseases or that render health and welfare services directly to needy people. The world of not-for-profit organizations had always included many other kinds of groups and institutions, of course, ranging from private schools and universities to opera guilds, sports associations, recreation societies, and many more, including the newer "advocacy groups" such as legal defense funds and public policy research organizations, all of which number today in the many tens of thousands. But it had never been thought appropriate—and certainly not practical—for these kinds of institutions to participate in the Combined Federal Campaign, especially since they were not engaged in supplying health and welfare services directly to human beings who were ill, infirm, poor, or distressed, thereby lessening the burdens of government in meeting such needs.

Statement of Donald J. Devine before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations, 98th Cong., 1st Sess. 3-4 (Mar. 24, 1983), *reprinted in* J.A. 309-310.

understanding was codified in the *Manual on Fund-Raising Within the Federal Service* (see note 2, *supra*), which stated that participation in the Campaign was confined to charitable organizations "providing direct services to persons in the fields of health and welfare services" (*id.* § 5.21).

However, in 1980, several legal advocacy groups ("legal defense funds")[6] applied to participate in the Campaign. The Office of Personnel Management denied those applications on the ground that the groups did not meet the "direct services" requirement articulated in the *Manual*. The groups then filed suit in federal district court in an attempt to gain admittance to the Campaign. In *NAACP Legal Defense & Educational Fund, Inc.* v. *Campbell* (*NAACP I*), 504 F. Supp. 1365 (D.D.C. 1981), the court held that the "direct services" requirement, as it was then employed, was unconstitutionally vague and could not be used as a basis for excluding organizations from participation in the Campaign.

Following the ruling in *NAACP I*, the Office of Personnel Management concluded that it was obliged to allow groups other than traditional health and welfare charities to participate in the Campaign, at least until more precise standards for determining eligibility could be developed. See J.A. 53-59, 104-105. In addition to respondents in this case, new participants in the Campaign included, inter alia, the Conservative Legal De-

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[6] We use the terms "legal advocacy groups" and "legal defense funds" to refer generally to organizations that provide legal services to clients based on whether the clients have a cause or claim that the legal defense funds wish to advance; the term "legal aid societies" refers to organizations that make legal services available to clients on the basis of financial need, without distinguishing on the basis of a particular cause. See 5 C.F.R. 950.101(a)(1)(i)(H).

fense and Education Fund, the National Right to Work Legal Defense Foundation, the Center for Auto Safety, and the National Organization for Women Legal Defense and Education Fund. *Id*, at 427-428. Inclusion of these advocacy groups caused a wide range of individuals and groups to complain that the Campaign was being politicized and that participation by such non-traditional groups would destroy the spirit of cooperation that had marked the Campaign in the past. See pages 36-41, *infra*. The change in the traditional scope of the Campaign brought open resistance in some quarters. For example, in 1982 a number of federal employee unions threatened to boycott the Campaign; in some cases those threats were carried out. See Pet. App. 63a-66a.[7]

2. Structure And Operation Of The Campaign Under Executive Order No. 12,404 [8]

In the period following the decision in *NAACP I*, President Reagan took several steps to respond to that decision and otherwise to improve the administration of the Campaign. In 1982, the President issued Executive Order No. 12,353, 3 C.F.R. 139 (1983), which replaced the 1961 order issued by President Kennedy. The 1982

[7] See also, *e.g.*, 48 Fed. Reg. 29458 (1983); *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 1st Sess. Pt. 1, at 69-70 (1983) (statement of Donald J. Devine).

[8] The description of the Campaign in this section and at later points in the brief reflects the regulatory scheme promulgated by the Office of Personnel Management in 1983 to implement Executive Order No. 12,404. OPM recently revised those regulations in an effort to comply with the decisions below pending further review. See 49 Fed. Reg. 32735 (1984). The new regulations changed both the eligibility criteria (which are at issue in this case) and certain operational features of the Campaign, so that the Campaign could proceed in the fall of 1984. The preamble to the new regulations states that they are issued "without prejudice to [OPM's] right or duty further to modify the rules in the event of a supervening direction from a court, the Congress, or the President" (*ibid.*).

executive order, in language very similar to that of the 1961 order, provided that the Director of OPM should make arrangements for a Campaign involving "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" (*id.* § 1). The order authorized the Director to establish criteria for determining eligibility for Campaign participation (*id.* § 2). In addition, it authorized the Director to use private groups, known as "principal combined fund organizations," to assist in managing the Campaign at the local level (*id.* § 5).[9]

In February 1983, President Reagan issued Executive Order No. 12,404, 3 C.F.R. 151, which establishes the Campaign eligibility criteria that are at issue in this case.[10] The new executive order was designed to cure the vagueness of the former "direct services" criterion, which had been condemned by the district court in *NAACP I*, and to return the Campaign to its original scope.

Section 1(b) of Executive Order No. 12,404 limits eligibility for the Campaign to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families." In order to qualify under this criterion, an organization's services must consist of:

> (1) care, research or education in the fields of human health or social adjustment and rehabilitation;
>
> (2) relief of victims of natural disasters and other emergencies; or

[9] Following the issuance of Executive Order No. 12,353, OPM promulgated a comprehensive regulatory scheme to take the place of the *Manual on Fund-Raising Within the Federal Service*. See 47 Fed. Reg. 29496 (1982), codified at 5 C.F.R. Pt. 950. These regulations were amended in 1983 and 1984. See 48 Fed. Reg. 29458 (1983); 49 Fed. Reg. 32735 (1984).

[10] Executive Order No. 12,404 took the form of an amendment to Executive Order No. 12,353.

(3) assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and human welfare services.

The order specifically excludes from the definition of charitable health and welfare agencies those organizations "that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves" (*ibid.*).[11]

The executive order explains that the purposes of the Campaign, and the rationale for the eligibility criteria, are to: (1) lessen the burdens of government and local communities in supplying health and welfare services to individuals and families; (2) provide a convenient channel through which federal employees may contribute to these efforts; (3) minimize or eliminate disruption in the federal workplace and the costs of fundraising; and (4) avoid the fact and appearance of government support for organizations that engage in partisan political activity or that focus their activities on advocacy of particular viewpoints or causes. Exec. Order No. 12,404, § 1(b).

Under the new executive orders, as in the past, all supervisory and oversight personnel for the Campaign are federal officials. 5 C.F.R. 950.103(c) and (d), 950.201 *et seq.* The Director of OPM or his delegate makes all policy, procedural, and eligibility decisions for the Campaign. Exec. Order No. 12,353; 5 C.F.R. 950.201 (a). The Director may authorize a private umbrella organization, known as a principal combined fund organization (PCFO), to provide administrative support services in connection with federal officials' conduct of a local Campaign. Exec. Order No. 12,353, § 5; 5 C.F.R. 950.211(e). The PCFO, which is usually a United Way affiliate, may be responsible for accounting for amounts

[11] The implementing regulations permit an otherwise eligible organization to expend up to 15% of its total annual expenditures for lobbying and litigation activities without losing eligibility to participate in the Campaign. See 5 C.F.R. 950.101(a)(2).

pledged and disbursement to designated organizations, as well as printing and preparation of informational materials. 5 C.F.R. 950.509(e) and (h), 950.521. The administrative expenses of the PCFO are reimbursed from the funds raised in the Campaign. 5 C.F.R. 950.509(e).

The PCFO and participating charities do not engage in any direct solicitation of funds from employees. That task is performed solely by federal employees themselves. Employee volunteers (known as keyworkers) distribute to their colleagues pledge cards and copies of a contributor's leaflet, which contains a list of participating charities and brief, 30-word statements about the nature of each charity's program. 5 C.F.R. 950.521(e)(2). These materials are "developed in the local area under direction of the local Federal [officials conducting the Campaign]" and are subject to the approval of those officials. 5 C.F.R. 950.521(a). The 30-word statements must be descriptive, may not contain particularized appeals for funds, and must be prepared "without undue use of voluntary agency symbols or other distractions that compete for the contributor's attention." 5 C.F.R. 950.521(d).

Federal employees may donate lump sums or may request that specified amounts be withheld from their salaries under a government payroll deduction plan. Employees may designate one or more of the organizations listed in the contributor's leaflet to receive their donations. Undesignated contributions are paid to the PCFO, which takes responsibility for distributing those funds to other organizations participating in the Campaign. 5 C.F.R. 950.509(e) and (g), 950.513, 950.519(d), 950.523. See Pet. App. 88a. Only designated contributions are at issue in this case at this stage of the proceedings.

3. Proceedings In This Case

a. Following the issuance of Executive Order No. 12,404, respondents, seven legal defense funds, brought this action in the United States District Court for the District of Columbia, seeking to enjoin their exclusion from the Campaign. Respondents contended that their

First and Fifth Amendment rights would be violated if participation in the Campaign were limited to traditional health and welfare charities in accordance with Executive Order No. 12,404.

The district court permanently enjoined the government from excluding respondents from eligibility to receive designated contributions through the Campaign (Pet. App. 84a-99a). Applying *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983), the court held that, "to the extent that it permits numerous charitable organizations to present their messages to federal employees," the Campaign constitutes a "limited public forum" subject to First Amendment constraints (Pet. App. 90a). The court characterized the restrictions on participation as a content-based prohibition (*id.* at 91a) and concluded that the reasons set forth in Executive Order No. 12,404 for those restrictions were insufficient to justify exclusion of respondents from eligibility to receive designated contributions through the Campaign (Pet. App. 92a-94a).[12]

b. A divided panel of the court of appeals affirmed (Pet. App. 1a-76a). Judge Edwards, writing for the majority, found it unnecessary to decide whether the Campaign constituted a "limited public forum" or a "nonpublic forum" under *Perry Education Assn.* because, in

[12] The district court determined that respondents' claim that they should not be excluded from receipt of *un*designated contributions received by the Campaign appeared to be more appropriately subject to equal protection analysis than to First Amendment review. It concluded, however, that consideration of this issue would be premature because final regulations implementing Executive Order No. 12,404 had not yet been promulgated. The court therefore dismissed the claim of access to undesignated funds without prejudice. Pet. App. 89a, 95a. Respondents did not appeal this holding.

The district court earlier rejected petitioner's motion to dismiss the complaint on the ground that respondents' challenge to the eligibility criteria would not be ripe until regulations implementing the executive order had been promulgated (J.A. 274, 335-337). Petitioner did not appeal that ruling.

the court's view, the exclusion of respondents did not satisfy even the reasonableness standard applicable to measures restricting speech in nonpublic forums (Pet. App. 16a-20a).[13] The court asserted that it was necessary to examine carefully the government's justification for restricting participation in the Campaign because there was no difference in "status" between the excluded organizations and those that participate in the Campaign. *Id.* at 20a-24a.

The court of appeals rejected the government's explanation that limiting participation in the Campaign to traditional health and welfare charities would decrease the burden on the government to provide such services (Pet. App. 24a-25a). The court noted that the litigation efforts of respondents had resulted in benefits to needy people, as well as enforcement of laws protecting the health of society through promotion of a clean environment. *Id.* at 24a-25a & n.13.

The court of appeals also rejected the government's explanation that advocacy, litigation, and lobbying groups were excluded from the Campaign in order to avoid the appearance of government support for partisan causes (Pet. App. 25a-27a). The court observed that legal defense funds were not considered to be political action groups for purposes of the Internal Revenue Code (*id.* at 25a-26a). The court expressed doubt that legal defense funds could constitutionally be excluded on the ground that their controversial nature might result in disruption of the workplace and pose a danger to the fundraising purposes of the Campaign (*id.* at 28a-31a). In addition, the court found no "tangible evidence in the record suggesting that some real and serious disruptions of the workplace will likely occur" (*id.* at 32a).

The court of appeals discounted the government's suggestion that without eligibility limitations the government would be inundated with philanthropic organizations seek-

[13] Judge Wright would have found that the Campaign constituted a "limited public forum" and that the First Amendment requirements applicable to such a forum were not satisfied (Pet. App. 42a).

ing to participate in the Campaign (Pet. App. 35a-36a). The court further concluded that the availability to respondents of alternative means of communication with federal employees was essentially irrelevant to analysis of the reasonableness of the Campaign limitations (*id.* at 26a-37a). The court ended by criticizing the dissenting opinion for applying a "rational basis test," rather than a reasonableness test (*id.* at 38a-39a).[14]

Judge Starr dissented (Pet. App. 43a-76a). In his view, because this case involved a nonpublic forum, the majority had employed "a stringent standard of review under the guise of a 'reasonableness test' that comports not at all with the deferential standard demanded by Supreme Court precedent" (*id.* at 44a). Judge Starr noted that there was ample record evidence that inclusion of the legal advocacy groups had caused losses during the 1983 Campaign and had threatened the future success of the Campaign (*id.* at 62a-66a). He stated that the limitations on Campaign participation articulated in Executive Order No. 12,404 constituted a reasonable means of minimizing disruption in the federal workplace and avoiding the appearance of governmental favoritism toward advocacy groups (*id.* at 66a-70a). Accordingly, Judge Starr concluded that limitation of participation in the Campaign to traditional health and welfare charities was constitutional because it was both reasonable and viewpoint-neutral.[15]

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[14] The court of appeals also rejected the government's argument that the Campaign cannot properly be described as any sort of First Amendment "forum" since the participating charities are not permitted to send representatives into the federal workplace and communicate only indirectly with federal employees. Pet. App. 14a-17a. Although acknowledging that the Campaign involves an "element of 'subsidization'" (*id.* at 16a), the court disagreed with the government's contention that exclusion of respondents from the Campaign implicated not First Amendment interests, but only equal protection concerns.

[15] Judge Starr found it unnecessary to reach the government's argument that the exclusion should be measured against equal protection standards (Pet. App. 45a n.1).

c. The court of appeals denied the government's suggestion for rehearing en banc by a vote of four to four (Pet. App. 80a-83a).[16] Judge Starr, joined by Judges Wilkey, Bork and Scalia, filed a dissenting statement. The dissenters noted that the panel's invocation of tax exempt status as the linchpin of its analysis would make it "difficult, if not impossible, for the federal government to exclude on a principled basis any of the hundreds of thousands of organizations across the country that enjoy [such] status" (*id.* at 82a). They concluded that en banc consideration was warranted "because of the enormous potential impact of this case on the [Campaign]; because of its critical misinterpretation of important First Amendment doctrine; and because of its misapplication of the standard for affirming the grant of summary judgment on appeal" (*id.* at 82a-83a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Through six different Administrations, beginning with the Kennedy Administration in 1961, the federal government (like many private employers that sponsor charity drives in the workplace) has limited participation in the Combined Federal Campaign to those traditional charities whose mission is to feed the hungry, heal the sick, or educate the ignorant. The success of the Campaign in attracting charitable contributions from federal employees has surely been attributable in substantial part to agreement by all involved in the Campaign that these traditional charities serve the public good. That consensus is one that transcends political, cultural, and philosophical differences. It seems entirely sensible for the government to continue to focus the efforts of the Campaign on assistance to the groups that serve the most basic human needs and that have always been the primary focus of charitable efforts.

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[16] Chief Judge Robinson and Judges Wald and Mikva did not participate in consideration of the rehearing petition (Pet. App. 81a).

The court of appeals nevertheless ruled that this historical limitation on the scope of the Campaign, codified by President Reagan in Executive Order No. 12,404, violates the First Amendment. In the view of the court of appeals, legal advocacy groups must be included in the Campaign, even though, unlike traditional health and welfare charities, advocacy groups are not universally regarded as furthering the public welfare in the most basic ways. Despite substantial evidence in the record that the recent court-ordered inclusion of legal advocacy groups has threatened the viability of the Campaign, disrupted the federal workplace, and created the appearance that federal resources are being used to further partisan causes, the court of appeals characterized the longstanding practice of excluding legal advocacy groups as "patently capricious and unreasonable" (Pet. App. 3a).

The ruling of the court of appeals finds no basis in this Court's First Amendment precedents; indeed, as the four judges who voted in favor of en banc consideration observed, the court's holding amounts to an unprecedented "transformation of the public forum doctrine in First Amendment analysis" (Pet. App. 82a). The decision of the court of appeals ultimately would force the President to restructure the Campaign quite substantially or, alternatively, to abolish the Campaign entirely. The First Amendment does not mandate a result so at odds with common sense.

A. The courts below approached this case as involving a First Amendment claim of equal access to government property for the purpose of engaging in a form of expressive activity, *i.e.*, charitable solicitation. But as this Court has made clear, the degree to which the First Amendment requires access to public property depends in part on the character of the property in question. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 44 (1983). On the basis of its earlier decisions in this area, the Court in *Perry* identified three categories—the traditional public forum, the limited public forum, and the nonpublic forum.

This case clearly falls within the nonpublic forum category. The federal workplace is not an area that, by tradition or designation, has been used by the public for assembly and communication of ideas; rather, its purpose is to get the employer's work done. The Campaign itself has not converted the federal workplace into a public forum. Since the inception of the Campaign, federal officials have consistently limited participation to traditional health and welfare charities, thereby excluding other groups, such as legal defense funds. Moreover, the Campaign has been structured in a way that affords participating charities little opportunity to engage in expressive activity. The charities may not solicit federal employees directly; their only communication to employees consists of a 30-word descriptive statement that is subject to approval by federal officials. Thus, the Campaign has never even approached the status of a public forum.

B. Restrictions on access to nonpublic forums are consistent with the First Amendment if "the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. The restriction at issue here is not based on the viewpoint of the excluded organizations; all groups other than traditional health and welfare charities are excluded from Campaign participation, regardless of their political or philosophical leanings. In addition, the President acted reasonably in continuing the limitation on Campaign participation to traditional health and welfare charities.

1. The distinction between traditional health and welfare charities and other types of organizations is reasonable in light of the purposes served by the Campaign and the federal workplace. There has long been a general understanding that it is appropriate for charitable drives in the workplace to focus on support for traditional charities. There is at least likely to be a greater consensus that the goals of such charities are worthwhile. Employers in the private sector and in state and local government commonly restrict on-the-job charitable solicita-

tion to traditional charities. Since there must be some limits on the scope of the Campaign, it seems entirely reasonable for the President to define eligibility in a way that has been accepted by other employers and that proved to be successful in practice over the first two decades of the Campaign.

2. Limitation of Campaign participation to traditional health and welfare charities also appears reasonable when examined in light of the objectives articulated in Executive Order No. 12,404: lessening the burden of government and local communities in meeting human health and welfare needs; minimizing disruption of the federal workplace and costs of fundraising; and avoiding the reality and appearance that federal resources are being used to advance partisan causes. The government clearly has an interest in encouraging private support for services that in turn will reduce the need for public funding of various social programs. It is not unreasonable for the President to conclude that that goal is more likely to be achieved as a result of contributions to charities that provide services directly to the needy and the sick.

Limiting Campaign participation to traditional health and welfare charities also helps to minimize disruption of the federal workplace, to reduce the costs of fundraising, and to maximize the success of the Campaign. The record in this case shows that the recent inclusion of a broader range of groups brought a widespread adverse reaction from federal employees, unions, local Campaign officials, and others. Some employees indicated that they would be unwilling to contribute to the Campaign so long as advocacy groups were included; and a number of federal employee unions sponsored boycotts of the Campaign or threatened future boycotts if the Campaign were not restored to its traditional scope. Particularly in view of this record evidence, the court of appeals' rejection of federal officials' predictions that inclusion of advocacy groups would impair the success of the Campaign is wholly inconsistent with the deference this Court has paid to such judgments in other nonpublic forum cases.

Moreover, the explicit exclusion of advocacy groups from the Campaign furthers the government's interest in avoiding the reality and appearance of using federal resources to advance the cause of political activity or advocacy of public policy positions. The court of appeals' suggestion that the tax exempt status of respondents ensures that inclusion of such groups will not threaten the government's interest in neutrality is simply inconsistent with both common sense and the record in this case.

3. Finally, the fact that alternative channels of solicitation, such as direct mailings to federal employees, are available to organizations that do not participate in the Campaign supports the conclusion that the eligibility criteria at issue here are reasonable.

4. The court of appeals' conclusion that limitation of the Campaign to traditional health and welfare charities is unreasonable resulted from its application of an inappropriately high level of scrutiny. The reasons offered by the court of appeals in support of its heightened scrutiny are simply insufficient to justify its departure from the deferential standard this Court has applied in nonpublic forum cases.

ARGUMENT

LIMITATION OF PARTICIPATION IN THE COMBINED FEDERAL CAMPAIGN TO TRADITIONAL HEALTH AND WELFARE CHARITIES IS CONSISTENT WITH THE FIRST AMENDMENT

This case involves a First Amendment challenge to the President's decision to limit participation in the Combined Federal Campaign to traditional health and welfare charities. The result of that decision is that other organizations, including legal defense funds and other advocacy groups, may not enjoy the benefit of contributions solicited from federal employees in the workplace.

There is no dispute that, since the inception of the Campaign under President Kennedy, participation has been limited to traditional health and welfare charities.[17]

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[17] The district court stated (Pet. App. 90a) that legal defense funds fell within the limits of the Campaign as it existed his-

Presumably the government could have chosen in 1961 to exclude charitable solicitation from the federal workplace altogether, so that all charities would have been confined to soliciting contributions from federal employees outside the workplace. Instead, President Kennedy determined that there should be a limited charitable fundraising program within the federal workplace, conducted by the federal government itself. The question here is whether the government, having established the Campaign and limited it to fundraising for the benefit of traditional health and welfare charities, is required by the Constitution to expand the Campaign to include fundraising for the benefit of other types of organizations.

The court of appeals determined that the historical limitation on Campaign participation is inconsistent with the First Amendment, at least to the extent that the Campaign fails to encompass fundraising for the benefit of legal advocacy groups. But that conclusion is not supported by either common sense or this Court's precedents. The four judges who voted in favor of en banc consideration correctly observed that the majority's holding rests on a "critical misinterpretation of First Amendment doctrine" (Pet. App. 83a).

Both the district court and the court of appeals viewed this case as involving a First Amendment claim of equal access to government property for the purpose of engaging in expressive activity. They purported to evaluate the limitation on Campaign participation in light of the

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torically, apparently because the 1961 executive order did not expressly differentiate among groups on the basis of how they achieve their objectives. However, the 1961 order referred to inclusion in the Campaign of "voluntary health and welfare agencies" and such other agencies "as may be appropriate" and delegated to the Chairman of the Civil Service Commission the responsibility of defining with greater precision the types of organizations that were "appropriate[ly]" included in the Campaign. See Exec. Order No. 10,927, § 2(a). Respondents have not challenged the proposition that the consistent administrative practice under the 1961 executive order was to exclude legal defense funds and other advocacy groups from the Campaign.

standards articulated in this Court's "forum" cases, in particular the analysis set forth in *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983). But a proper application of those standards leads to the conclusion that the limitation at issue here is entirely consistent with the First Amendment. We show below that this case is properly classified as involving a nonpublic forum, and is therefore subject to a less exacting level of First Amendment scrutiny. Limitation of the Campaign to traditional health and welfare charities satisfies the First Amendment because, as we explain, it is a reasonable restriction that is not based on the viewpoint of the excluded organizations.

A. This Case Involves A Nonpublic Forum

1. The Court in *Perry* made clear that the degree to which the First Amendment requires access to government property depends in part on the character of the property in question. 460 U.S. at 44. The Court surveyed the decisions in which it had considered claims of access to government property and concluded that they involved three broad categories—traditional public forums, limited public forums, and nonpublic forums. The demands of the First Amendment are most exacting in the case of a traditional public forum and least exacting in the case of a nonpublic forum.

"At one end of the spectrum," the Court in *Perry* identified traditional public forums—those "places which by long tradition or government fiat have been devoted to assembly and debate." 460 U.S. at 45. Parks and streets, for example, " 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions' " (*ibid.*, quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939)). In these "quintessential public forums" the government may not prohibit all communicative activity. Content-based exclusions may be enforced only if they are necessary to serve a compelling state interest and are

narrowly drawn to achieve that end. 460 U.S. at 45. The government may also enforce reasonable time, place, and manner regulations that are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Ibid.*

The second, intermediate category of property described in *Perry* is the "limited public forum." The Court defined that category as public property that is not by tradition recognized as a public forum, but that the government, at least for the time being, "has opened for use by the public as a place for expressive activity" (460 U.S. at 45). Although the government has no constitutional obligation to maintain indefinitely the open character of the facility, "as long as it does so it is bound by the same standards as apply in a traditional public forum" (*id.* at 46). The Court suggested in *Perry* that university meeting facilities (*Widmar* v. *Vincent*, 454 U.S. 263 (1981)), school board meetings (*City of Madison Joint School District No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)), and municipal theaters (*Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975)) fall within the description of "limited public forums." The Court pointed out that "[a] public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects" (460 U.S. at 46 n.7; citations omitted).

The third category described by the *Perry* Court involves public property that is "not by tradition or designation a forum for public communication" (460 U.S. at 46). In addition to imposing time, place, and manner restrictions, the government may selectively deny access to such nonpublic forums in order to "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view" (*ibid.*). The Court classified the school mail facilities in *Perry* as a non-

public forum (*id.* at 46-48). The Court also included in this category postal mailboxes (*United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981)); prisons (*Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), and *Adderley* v. *Florida*, 385 U.S. 39 (1966)); military bases (*Greer* v. *Spock*, 424 U.S. 828 (1976)); and municipal transportation systems (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974)). See 460 U.S. at 46, 49 n.9.

Access distinctions based on subject matter and speaker identity, which may be impermissible in a public forum, are "[i]mplicit in the concept of the nonpublic forum" and are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." 460 U.S. at 49. A government facility does not become a public forum simply because it is used for communication of ideas, or because outside groups have been given selective access. *Id.* at 46-47; *Greer* v. *Spock*, 424 U.S. at 838 n.10; *Lehman* v. *City of Shaker Heights*, *supra*. Otherwise, as Justice Blackmun observed in writing for the plurality in *Lehman*, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." 418 U.S. at 304. Accord, *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 130 n.6.

2. This case clearly falls within the nonpublic forum category, rather than either of the public forum categories. Indeed, this case appears to be near the outer perimeter of the nonpublic forum category, at the opposite end of the spectrum from cases involving speech in streets and parks.

The government property, or "forum," involved in this case is the federal workplace.[18] Clearly the workplace is

[18] The courts below seemed to regard the Campaign as the relevant forum. But the Campaign itself does not constitute govern-

not a place that by tradition or designation has been used by the public for assembly and communication of ideas. Federal buildings generally are open only to those members of the public having business with the agency housed in that facility. See Pet. App. 51a. The federal workplace, like any place of employment, exists to get the employer's work done. Cf. *Connick* v. *Myers*, 461 U.S. 138, 150-151 (1983). In its capacity as an employer, the federal government has a strong interest in controlling activities in the workplace, including the Campaign. *Id.* at 150-154; *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Ex parte Curtis*, 106 U.S. 371, 373 (1882). See also *Cafeteria & Restaurant Workers, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961) (noting the wide latitude afforded to the federal government in the "dispatch of its own internal affairs"). As Judge Starr observed, the federal workplace within which the Campaign takes place "bears little resemblance to a public street or park, * * * paradigms of the public forum;" its business is "to attend to the myriad interests and duties of government, not to provide a public forum for First Amendment communication" (Pet. App. 50a).

Despite the nonpublic nature of the federal workplace, the district court suggested (Pet. App. 90a) that the federal government, through the Campaign, has opened the workplace for the purpose of charitable solicitation,

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ment property; rather, it is an activity that takes place in the federal workplace. It is the workplace, and not the Campaign, to which respondents ultimately seek access. Compare, *e.g.*, *U.S. Southwest Africa/Namibia Trade & Cultural Council* v. *United States*, 708 F.2d 760, 764 (D.C. Cir. 1983).

Of course, it should make little difference whether it is the federal workplace or the Campaign itself that is viewed as the relevant forum. Both the majority and the dissent in the court of appeals recognized (Pet. App. 20a n.11, 48a-50a) that the Campaign must be examined in the context of the workplace where it is conducted. Thus, any analysis of restrictions on participation in the Campaign must take into account the government's interest in reserving the workplace for the purposes to which it is dedicated.

thereby creating a "limited public forum" to which legal defense funds have the same right of access as traditional charities. In the district court's view, the government, in sponsoring the Campaign, furnished "'a billboard or channel of communication through which organizations can disseminate their appeals to federal workers'" (*ibid.*, quoting *NAACP I*, 504 F. Supp. at 1367). That analysis might have some validity if the government had indiscriminately opened the Campaign for expressive activity by any group seeking to solicit funds from federal employees. See *City of Madison Joint School District No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. at 174-175 & n.6. But that is not the case at all.

Neither the history nor the structure of the Campaign evidences any intent on the part of the federal government to allow the public unrestricted access to federal property to solicit funds from federal employees. The original impetus for establishing the Campaign was not any affirmative desire to provide an open forum for charitable solicitation in the federal workplace; rather, federal officials were concerned primarily with the disruption that had resulted from ad hoc solicitation activities. See pages 4-5, *supra*. The Campaign was instituted as a way of regulating charitable solicitation in the federal workplace, in order to minimize such disruption, while still affording federal employees a convenient channel for making charitable contributions.

Since its establishment, the Campaign has been the exclusive avenue for charitable solicitations in the federal workplace. And at least since 1961, the federal government's consistent practice has been, not to permit participation by any group that sought admission, but to limit the Campaign to traditional health and welfare charities. Other groups, including legal defense funds, have never been voluntarily admitted to the Campaign. See pages 6-7 & note 5, *supra*. See also *Combined Federal Campaign: Hearings Before the Subcomm. on the Civil Service of the House Comm. on Post Office and*

Civil Service, 96th Cong., 1st Sess. 20 (1979) (comments of Alan K. Campbell, Director, Office of Personnel Management).[19]

This Court has made clear that a nonpublic forum does not become a public forum, traditional or otherwise, simply because the government has provided certain groups with selective access to the facility. See *Perry*, 460 U.S. at 47 (prior grant of access to YMCA, Cub Scouts, and other civic and church organizations did not convert school mail system into a public forum). See also *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, *supra* (no First Amendment violation, although bulk mailing and meeting rights were extended to Jaycees, Alcoholics Anonymous, and the Boy Scouts, but not to prisoners' union); *Greer* v. *Spock*, 424 U.S. at 838 n.10 (fact that some civilian speakers and entertainers had been invited to Fort Dix did not convert it into a public forum); *Lehman* v. *City of Shaker Heights*, *supra* (rental of space for commercial advertising did not require city transit system to accept partisan political advertising). Thus, admission of traditional health and welfare charities to the Campaign during the 1960s and 1970s did not somehow transform the Campaign into a public forum that must now be held open to any group that wishes to enjoy its benefits.

Moreover, the amount of expressive activity by charities involved in the Campaign has always been quite minimal. The Campaign as a whole is unquestionably a federally sponsored enterprise. Participating charities

[19] Advocacy groups, including respondents and other legal defense funds, have participated in the Campaign since 1981 as a result of court decisions. They were included in 1981 and 1982 because the district court in *NAACP I* had struck down the earlier "direct services" standard for Campaign eligibility on vagueness grounds. See J.A. 53-59, 104-105. The advocacy groups were included in 1983 and 1984 as a result of the decisions below. See 48 Fed. Reg. 34910, 34913-34914 (1983); 49 Fed. Reg. 32735 (1984). As Judge Starr noted (Pet. App. 54a), this "is not a case of the government's trying to close the barn door after voluntarily allowing the horse to gallop away."

ultimately receive contributions made through the Campaign, but they do not themselves run the Campaign or engage in any direct solicitation of federal employees.[20] Federal officials direct the Campaign, and volunteer federal employees are responsible for solicitation of funds from their colleagues. See pages 10-11, *supra*. Participating charities may not send representatives into the workplace. 5 C.F.R. 950.507(a).

The only communication from a charity to federal employees that is permitted under the Campaign is a 30-word statement included in the contributors' leaflets distributed in the workplace by volunteer federal employees during the six-week period when the Campaign is conducted each year. This brief statement may only describe the charity's activities; it may not contain a particularized appeal for donations or use symbols that would compete for the attention of contributors. The 30-word statement is subject to approval by federal officials and may be edited by them if it does not conform to the regulatory requirements. 5 C.F.R. 950.521(a), (d) and (e).[21]

[20] A private organization, the principal combined fund organization (PCFO), may perform many of the administrative functions involved in a local Campaign. See pages 10-11, *supra*; Exec. Order No. 12,353, § 5. But in performing these functions the PCFO (normally a United Way affiliate) acts as an agent of the federal officials who direct the local Campaign. Although the PCFO may be responsible for printing Campaign materials, federal officials have ultimate control of the content of those materials. See page 11, *supra*. PCFO representatives do not conduct direct solicitation in the federal workplace.

The court of appeals pointed to statements in the executive orders governing the Campaign to the effect that charitable groups "solicit" funds from federal employees. See Pet. App. 14a. But this usage is simply a shorthand reference to inclusion of charities as Campaign beneficiaries. Nothing in the record suggests that the charities themselves have ever been permitted to enter the workplace in order to solicit funds directly from federal employees since the Campaign was established.

[21] OPM advises us that federal officials often approve the draft descriptive statements as submitted by the participating charities.

This form of indirect and severely restricted communication is, of course, quite different from the sort of charitable solicitation activity that this Court has characterized as expression protected by the First Amendment. The latter is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). See also *Secretary of State* v. *Joseph H. Munson Co.*, No. 82-766 (June 26, 1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Unlike the activities considered in those cases—door-to-door solicitation, fundraising events apparently directed to the public in general, and face-to-face solicitation at a state fair—the Campaign by definition rules out face-to-face contacts, persuasive speech, or even any communication of information beyond a brief, neutral description of a charity's activities.

The restrictions that have always existed in connection with the Campaign make it a context in which the First Amendment interests of groups that wish to participate are decidedly weak; indeed, the primary advantage such groups would gain from participation is not a platform for expressive activity, but rather the benefit of a collection mechanism that would enable them to reduce their own fundraising expenditures. Cf. *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983). Thus, to the extent this case can be said to involve a "forum" at all (see Pet. 14 n.14), it does not present the characteristics of a forum that the government "has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45. See also *Minnesota State Board for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 9. In fact, the Campaign and the workplace in which it is conducted seem considerably further removed from the public forum category than, *e.g.*, the mailboxes in *Perry* or the military base in *Greer* v. *Spock*. Accordingly, the case clearly

falls into the nonpublic forum category and is, we submit, near the edge of the spectrum described by this Court's "forum" cases.[22]

B. Limiting Participation In The Campaign To Traditional Health And Welfare Charities Is Reasonable And Is Therefore Consistent With The First Amendment

The President's decision to continue the longstanding policy of restricting Campaign participation to traditional health and welfare charities is entirely consistent with the First Amendment. Since this case involves a

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[22] We note that all of the cases this Court has identified as involving nonpublic forums have entailed considerably more expressive activity than is at issue here. Several of those cases involved property that was specifically dedicated to communicative activity, *i.e.*, mailboxes or advertising space. See *Perry*, *supra*; *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, *supra*; *Lehman* v. *City of Shaker Heights*, *supra*. Other nonpublic forum cases have considered activities that are clearly expressive in nature. See, *e.g.*, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, *supra* (union activities); *Greer* v. *Spock*, *supra* (leafleting, political rallies); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (civil rights demonstration). As we pointed out in the text, neither the property at issue here nor the "activity" in which respondents seek to engage involves a significant amount of expression.

Indeed, some aspects of the Campaign, such as the payroll deduction feature, do not appear to implicate any First Amendment interest at all. In *City of Charlotte* v. *Local 660, International Ass'n of Firefighters*, 426 U.S. 283 (1976), the Court held that a city did not violate equal protection in refusing to withhold union dues from employee paychecks, while permitting payroll deductions for certain other purposes (including contributions to the United Way). The Court did not even suggest that such a policy might be the subject of a First Amendment claim.

Of course, even if this case were not subject to First Amendment "forum" analysis, restrictions on Campaign participation would still be subject to an inquiry into whether the distinctions the President has drawn violate the right to equal protection of the laws. Cf. *Regan* v. *Taxation With Representation*, *supra*. Under either equal protection analysis or nonpublic forum analysis, the basic inquiry is addressed to the reasonableness of the line established by the government. See page 46 note 37, *infra*.

nonpublic forum, there is no inherent constitutional infirmity in the decision to exclude some groups from participation in the Campaign. As this Court noted in *Perry*, "the right to make distinctions in access on the basis of subject matter and speaker identity" is "[i]mplicit in the concept of the nonpublic forum" (460 U.S. at 49). Although such distinctions may be impermissible in a public forum, they are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property" (*ibid.*).

This Court in *Perry* articulated the standard for evaluating restrictions on access to nonpublic forums. Such restrictions are consistent with the First Amendment if "the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 460 U.S. at 46. It is clear that the limitation of Campaign participation to traditional health and welfare charities is not based on opposition by federal officials to the views of the groups that are thereby excluded. For example, all advocacy groups are ineligible to participate, regardless of their political or philosophical leanings; the excluded groups include, *e.g.*, the Conservative Legal Defense and Education Fund, respondent NAACP Legal Defense and Educational Fund, Inc., the National Right to Work Legal Defense Foundation, and various environmental groups.[22]

[22] This Court has held that restrictions that "are not aimed at particular parties, groups, or points of view" are properly regarded as viewpoint-neutral. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973); see also *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion). Neither the district court nor the court of appeals made any finding that respondents were excluded from the Campaign because of official opposition to their views.

Respondents suggested below that Executive Order No. 12,404 is not viewpoint-neutral because it discriminates against groups that advocate use of litigation to achieve their goals. But it is the goals of the groups that constitute their viewpoints for purposes of First Amendment analysis, not their use of litigation. Judge Starr correctly noted (Pet. App. 71a) that litigation is properly regarded not as a viewpoint, but merely as a means of promoting a viewpoint.

And, of course, it is not only legal defense funds that are ineligible to participate in the Campaign. Universities, churches, opera guilds, animal welfare groups, and a host of additional organizations also are excluded from participation under the executive order.

The constitutionality of limiting the Campaign to traditional health and welfare charities therefore turns on the other prong of the test articulated in *Perry*—whether the regulation on speech is reasonable. The reasonableness of restrictions on Campaign participation must be evaluated in light of the purposes served by the Campaign and the federal workplace. Analysis of those purposes leaves little doubt that the President acted rationally in restoring the limitation on Campaign participation to traditional health and welfare charities.

1. *Limiting Participation To Traditional Health And Welfare Charities Is Reasonable In Light Of The Common Understanding Of The Purposes Of Charitable Drives Conducted In The Workplace*

There has long been a general understanding that it is appropriate for charitable drives conducted in the workplace to focus on support for traditional charities, particularly those that provide basic health and welfare services to the needy. The distinction between such traditional charities and other types of organizations is obviously one that seemed natural to President Kennedy and to the federal officials who implemented his 1961 executive order for 20 years. It is a distinction that is not at all illogical or difficult to grasp. This Court itself has recently recognized that there are differences between these two types of groups. See *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. at 635 (distinguishing between charitable organizations

whose "primary purpose is * * * to provide money or services for the poor, the needy or other worthy objects of charity" and those that "gather and disseminate information about and advocate positions on matters of public concern").[24]

The longstanding acceptance of such a distinction is not surprising. Most people would perceive a meaningful difference between traditional charities that render services directly to the needy or the sick (*e.g.*, the American Red Cross, the National Spinal Cord Injury Association, and the Juvenile Diabetes Foundation), on the one hand, and, *e.g.*, legal defense funds and other advocacy groups that render services on the basis of compatibility with a cause and that, at best, provide only indirect benefits to the needy and the sick, on the other. There is at least likely to be a greater consensus that the goals of the former are worthwhile. Thus, limitation of Campaign participation to traditional charities is likely to contribute significantly to acceptance of the Campaign by federal employees and to the ultimate success of the Campaign.

The widespread practice of employers in the private sector and in state and local government confirms the inherent reasonableness of the distinction betwen traditional health and welfare charities and other types of organizations in the context of the Campaign. As Judge Starr noted (Pet. App. 51a-52a), private employers commonly limit on-the-job charitable solicitation drives to traditional health and welfare charities, often those affiliated with the United Way. See *e.g.*, *Serv-Air, Inc.* v. *NLRB*, 395 F.2d 557, 560 (10th Cir.), cert. denied, 393 U.S. 840 (1968); *Moye* v. *Chrysler Corp.*, 465 F. Supp. 1189 (E.D. Mo.), aff'd mem., 615 F.2d 1365 (8th Cir.

[24] In *Village of Schaumburg* the Court concluded that such distinctions were not sufficient to justify a prohibition on door-to-door solicitation that would affect advocacy groups but not most traditional charities. However, as the Court noted in *Perry*, distinctions that are not permissible in a public forum may be found reasonable when applied to a nonpublic forum. See 460 U.S. at 49.

1979); *Hammary Manufacturing Corp.*, 258 N.L.R.B. 1319, 1320 (1981), modified, 265 N.L.R.B. 57 (1982); Note, *United Charities and the Sherman Act*, 91 Yale L.J. 1593, 1593 n.2 (1982) (noting that local chapters of the United Way of America enjoy exclusive access to almost 90% of the workplaces in which they solicit); Rose-Ackerman, *United Charities: An Economic Analysis*, 28 Pub. Pol'y 323, 340 n.34 (1980) (few employers have open-ended charity drives that include all tax-exempt organizations). The same is true of most state and local governments. See, *e.g.*, *City of Charlotte* v. *Local 660, International Ass'n of Firefighters*, 426 U.S. 283, 287 n.3 (1976); *Black United Fund of New Jersey, Inc.* v. *Kean*, 593 F. Supp. 1567 (D.N.J. 1984); *International Service Agencies* v. *United Way of New York State*, 108 Misc.2d 305, 437 N.Y.S.2d 533 (Sup. Ct. 1981).[25]

The United Way and similar federated charities, which play such a prominent part in workplace charitable drives, have consistently limited their membership to traditional health and welfare charities and have excluded other groups, such as advocacy groups like respondents. See *Executive Orders 12353 and 12404 as They Regulate the Combined Federal Campaign*, *supra*, at 249 (statement of Jack Moskowitz, Senior Vice President, Federal Government Relations, United Way of America); United Way of America, *1983 Annual Report* 29 (listing health and social services providers that receive United Way funds); Rose-Ackerman, *supra*, at 337-338. Indeed, federated charities, like the federal government in this case, take the position that limitation of their memberships to health and welfare groups, which have broad support from potential donors, is essential to the success of their

[25] The United Way and its predecessors (*e.g.*, community chest groups) owe much of their success to strong support from private and public employers. See C. Bakal, *Charity U.S.A.* 407-408 (1979); United Way of America, *1983 Annual Report* 27 (approximately 50% of United Way support in 1982 came from employees in the private sector; another 11% came from employees in the nonprofit and government sectors).

efforts. See, *e.g.*, *United Charities and the Sherman Act*, *supra*, at 1595 & n.11.

We do not suggest that the practices of public officials are necessarily constitutional simply because they are consistent with the practices of other employers. Unlike the government, private employers and groups like the United Way are not subject to the demands of the First Amendment. But the practices of other employers are clearly relevant to the question whether the government has met the standard of reasonableness applicable to restrictions on access to a nonpublic forum. The fact that private employers and United Way groups have distinguished between traditional health and welfare charities and other types of organizations for purposes of fundraising drives in the workplace strongly suggests that it is rational for the federal government, acting in its capacity as employer, to make a similar distinction for purposes of the Campaign.

It also is important to emphasize that, like most charity drives conducted in the workplace, the Campaign is not regarded simply as a clearinghouse for collection of employee contributions by any interested organization. Instead, it represents an effort to direct the maximum benefit to the class of groups that are generally perceived as serving the most basic human needs. The federal government itself sponsors the Campaign and actively encourages employees to contribute to it. That sponsorship role makes it particularly reasonable that the government should be able to define the scope of the Campaign in a generally accepted manner. Even the court of appeals recognized (Pet. App. 35a) that it may be necessary for the government to draw a line somewhere in order to confine the Campaign to a manageable scope. In view of the need to draw such a line, it seems entirely sensible for the President to choose to define eligibility in the manner that has gained acceptance among other employers and that proved successful in practice during the 20 years following initiation of the Campaign.

2. *Limiting Participation To Traditional Health And Welfare Charities Is Reasonable In Light Of The Purposes Set Out In Executive Order No. 12,404*

Limitation of Campaign participation to traditional health and welfare charities also appears reasonable when examined in light of the purposes articulated in Executive Order No. 12,404. Section 1(b) of the executive order sets out those purposes: lessening the burden of government and local communities in meeting human health and welfare needs; minimizing disruption of the federal workplace and costs of fundraising, while still offering federal employees a convenient channel for their charitable donations; and avoiding both the reality and appearance that federal resources are being used to advance political activity or advocacy of public policy, lobbying, or philanthropy that does not directly serve needs of human health and welfare.

a. There can be little question that the federal government has a significant interest in reducing the level of public funding required for various social programs (*e.g.*, food stamps and Medicaid) by maximizing the amount of private support for such services. In furtherance of that interest, it is surely reasonable for the government to make it more convenient for federal employees to contribute to organizations, like the American Red Cross or the American Cancer Society, that directly serve the needy and the sick, while leaving other types of groups to raise funds from federal employees outside the federal workplace. See *Regan* v. *Taxation With Representation*, 461 U.S. at 548-551; *Harris* v. *McRae*, 448 U.S. 297, 316-318 (1980).

The court of appeals appears to have accepted the proposition that the government has a legitimate interest in maximizing the level of contributions to organizations that provide health and welfare services directly to the needy and the sick. The court nevertheless termed "patently ludicrous" the President's use of this consideration as a basis for limiting the scope of the Campaign

(Pet. App. 24a). In the court's view, the efforts of respondents and other advocacy groups benefit the needy and society in general as much as the efforts of the traditional groups. But surely the President may rationally conclude, in Judge Starr's words, that "in general a dollar given to a traditional health and welfare charity will more certainly aid the needy than a dollar given to an advocacy group" (Pet. App. 67a n.39). Cf. *Regan* v. *Taxation With Representation*, 461 U.S. at 548-549, 550-551; *Buckley* v. *Valeo*, 424 U.S. 1, 98 (1976). Since litigation is a risky business, the efforts of a legal defense fund to compel others to expend funds for, or provide services to, the needy may or may not produce the desired result. Traditional health and welfare charities, in contrast, do not rely on intervention by the courts to produce the desired benefits.[26]

b. Limiting Campaign participation to traditional health and welfare charities also helps to minimize disruption of the federal workplace, to reduce the costs of fundraising, and to maximize the success of the Campaign. One of the primary purposes of instituting the Campaign in the first place was to minimize the disruption caused by the absence of government-wide regulation of fundraising in the federal workplace, while providing a convenient channel for employee contributions. See pages 4-5, *supra*. Common sense suggests that these objectives would be best served by focusing Campaign efforts on groups that are universally recognized as providing particularly worthwhile services that address the most basic human needs and by excluding groups whose primary focus is on advocacy activities.[27] Even if the reasonableness of such a

[26] Moreover, the efforts of one legal defense fund might well be neutralized by those of another fund that supports an opposing view of where the public interest lies, so that no net "benefit" would result from either group's activities. Contributions to traditional health and welfare charities, on the other hand, are likely to produce at least some net benefit to the intended recipients of the services.

[27] Advocacy activities are by their nature likely to engender controversy, since they involve the promotion of one of several opposing positions. For example, those litigating in support of a particular cause normally direct their efforts against those who have different views on the merits of that cause. As Judge Starr noted (Pet. App. 62a-63a n.23; emphasis omitted), organizations that espouse or oppose policies "like affirmative action or the closed shop are controversial, for the plain reason that the arguments for and against such policies are controvertible in a way that arguments in favor of a policy of seeking a cure for cancer are not."

judgment were not intuitively obvious, it is confirmed by the government's recent experience with the Campaign.

Following the 1981 decision in *NAACP I* (see page 7, *supra*), which invalidated the "direct services" formulation of Campaign eligibility on the ground of vagueness, federal officials concluded that they were required to include advocacy groups in the Campaign, at least until they were able to promulgate more precise eligibility standards. See pages 7-8, *supra*. That temporary expansion of the scope of the Campaign brought a widespread adverse reaction that appeared to threaten the future of the Campaign. As Judge Starr noted (Pet. App. 63a (footnote omitted)), "inclusion of the advocacy groups caused both specific losses in the 1983 campaign and threatened the success of the charitable campaign in the years to come."[28]

The record contains numerous letters in which employees, union officials, and local Campaign officials protested (some in quite vehement terms) the inclusion of advocacy groups in the 1983 Campaign (held in the fall of 1982, see note 28, *supra*). Some employees indicated that they would not be willing to contribute to the Campaign unless it were returned to its traditional scope. See J.A. 275-276, 277-280, 286, 289, 303-304, 348-349, 357, 392. Some federal employee unions urged employees to

[28] Judge Starr was referring to the Campaign held in the fall of 1982. See Pet. App. 63a. As Judge Starr noted (*ibid.*), federal employees are solicited in the fall of the year for a pledge of contributions that will be deducted from their paychecks the following year. Thus, the Campaign held in the fall of 1984 is referred to as the 1985 Campaign. This usage has created some confusion, with the result that references in the record are sometimes inconsistent.

boycott the 1983 Campaign because of the inclusion of the National Right to Work Legal Defense Foundation. At least one union, the International Association of Machinists and Aerospace Workers, boycotted the Campaign on a nationwide basis. See *id.* at 88-90. Local boycotts also reduced contributions in some parts of the country. See, *e.g.*, *id.* at 25, 36-38, 44, 280, 311, 354, 360-361, 366, 372, 375, 378.[29] See also *id.* at 23-24, 34, 91- 93, 350, 356, 360, 364-365, 368, 370, 377. In some cases, federal officials were able to forestall boycotts only by representing that the Campaign would return to its traditional scope in the future. See *id.* at 40-42, 374. Local Campaign officials urged a return to the traditional limitation on participation because of the adverse effects of inclusion of the advocacy groups. See *id.* at 40-43, 278-280, 287-288, 297-302, 346-349, 351-355, 357-358, 363, 367-371, 374-380, 389, 393. In addition, Members of Congress wrote on behalf of their constituents to protest inclusion of the new groups. See *id.* at 281-283, 293-296; *Executive Orders 12358 and 12404 As They Regulate the Combined Federal Campaign: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 1st Sess. Pt. 1, at 103-171 (1983). Traditional health and welfare charities reported that inclusion of the advocacy groups had interfered with the success of the Campaign, which in turn resulted in a reduction of the support on which the traditional groups depended. *Id.* at 359, 381-388.

While nationwide contributions to the 1983 Campaign generally kept pace with inflation, the increase in the level of donations was smaller than in previous years, and the percentage of federal employees contributing to the Campaign declined. Pet. App. 63a, 65a; J.A. 430.[30]

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[29] For example, at the St. Louis, Missouri office of the Defense Mapping Agency, pressure groups picketed and distributed leaflets urging federal employees not to contribute to the Campaign. J.A. 352-353.

[30] Sidney M. Ford, Chairman of the Federal Executive Board of Greater St. Louis, citing the adverse consequences of inclusion of advocacy groups in the fall of 1982, described the probable consequences for the future of the Campaign (J.A. 370-371; Pet. App. 75a-76a):

> There is a growing concern on the part of Federal officials that if the CFC does not remove many of the controversial organizations, dire results will occur. Many people are looking for a chink in the CFC armor, and it appears that by including advocacy groups we play into their hands; and we provide the "I'll give at home" individual the excuse for not participating.

Moreover, the record indicates that the ability of the 1983 Campaign to maintain past levels of support was due in large measure to investments of extraordinary time and effort by those involved in the Campaign.[31] Of course, since Campaign solicitations occur "during duty hours" (5 C.F.R. 950.103(e)), each extra hour spent on fundraising is an hour not spent on the employee's regular duties.

Although it seems self-evident that the government has an interest in avoiding disruption of the federal workplace and ensuring the success of the Campaign, the court of appeals found it "extremely disturbing" that federal officials might choose to structure the Campaign in a manner that would minimize employee protest (Pet. App. 28a). Despite the record evidence described above, the court found "no plausible reason to suspect that the lim-

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[31] For example, the chairman of the Dallas-Fort Worth Federal Executive Board reported that the 1983 Campaign succeeded in the Dallas-Forth Worth area "because we devoted additional time and efforts * * * to explain to our employees the change taking place regarding the admission of nonhealth and welfare organizations," but that "[w]e cannot devote the additional time of our staff to further sell the CFC without detracting from our Agency mission" (J.A. 40). See also *id.* at 278, 354, 368, 378.

The experience of the 1983 Campaign suggests that expansion of the Campaign beyond its traditional scope tends to create morale problems and to divert some federal employees from their normal duties. The court of appeals' suggestion (Pet. App. 32a) that the government may discipline federal employees who engage in Campaign-related disruption that impairs efficiency misses the point. The government's interest lies in *avoiding* situations that give rise to the need for discipline.

ited and unobtrusive communications at issue will in any way interfere with the normal activities in the workplace" (*id.* at 32a). It declined to defer to what it referred to as "the fanciful—and somewhat specious—speculations" of the government on this subject (*ibid.*). The court further stated that it was unpersuaded by the government's contention that inclusion of legal advocacy groups would threaten the fundraising purposes of the Campaign (*id.* at 33a).

In summarily rejecting federal officials' concern with disruption of the workplace and the success of the Campaign, the court of appeals disregarded this Court's consistent recognition that the government has a legitimate interest in excluding from a nonpublic forum particularly controversial expressive activity that may threaten the success of some governmental venture. In *Perry* itself, the Court found it relevant that exclusion of a rival union from a school mail system would help to preserve labor peace within the schools (460 U.S. at 52). And in *Lehman* v. *City of Shaker Heights*, the Court recognized (418 U.S. at 304) that exclusion from mass transit vehicles of political advertising that might offend some patrons was justified in part because it would avoid jeopardizing revenues to the city. See also *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 129; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 132-133.[32]

[32] The court of appeals observed that a decision to exclude certain types of groups in part because their inclusion would be likely to provoke controversy among federal employees would be inconsistent with this Court's First Amendment precedents. See Pet. App. 28a-30a. However, the cases it cited in support of that proposition do not concern nonpublic forums.

More important, the court of appeals appears to have believed that the government was asserting the right to exclude individual groups from the Campaign in response to objections from federal employees. See, *e.g.*, Pet. App. 30a. We do not make any such claim. Instead, we contend that in determining what restrictions should be placed on access to a nonpublic forum, it is entirely appropriate for government officials to consider whether certain

Furthermore, the court of appeals should not have second-guessed the judgment of federal officials that expansion of the traditional scope of the Campaign was likely to lead to disruption and to interfere with the success of the Campaign. As we discussed above, the record in this case fully supports the predictions of federal officials on this score. Even if there were no such record evidence, this Court has made it clear that in nonpublic forum cases government officials are not required to produce empirical proof in support of their predictions about the likely effect of controversial speech. *Perry*, 460 U.S. at 52 n.12 (citing *Greer* v. *Spock*, *supra*); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 127-128 n.5. Federal officials need not await the disruption of the workplace or the destruction of the Campaign before taking remedial action. See *Connick* v. *Myers*, 461 U.S. at 152.[33]

c. The third objective articulated in Executive Order No. 12,404—avoiding the reality and appearance of using federal resources to advance the cause of political activity or advocacy of public policy—is also a legitimate ground for exclusion of advocacy groups from the Campaign. This Court has recognized in the Hatch Act cases that the federal government has a strong interest in preserving neutrality and the appearance of neutrality in the federal

classes of groups—which can be distinguished on a basis other than the fact that they share a particular viewpoint—are more likely to provoke controversy than others and to threaten the success of the common venture.

[33] The court of appeals took the position that inclusion of advocacy groups would not threaten the viability of the Campaign because "providing employees a broad range of groups to choose among may encourage, rather than discourage, employee contributions" (Pet. App. 33a). Of course, it is always possible that the court of appeals' prediction, rather than that of federal officials, would turn out to be correct. But federal officials have made a reasoned judgment, based on firsthand observation of the experience of several Campaigns in which advocacy groups participated, that inclusion of those groups is more likely to harm the success of the Campaign in the long run.

workplace. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564-565 (1973). And in *Greer* v. *Spock*, 424 U.S. at 839, and *Lehman* v. *City of Shaker Heights*, 418 U.S. at 304, the Court concluded that the government's desire to avoid "lurking doubts" (*ibid.*) of favoritism or entanglement with partisan political activity would justify restrictions on expressive activities in nonpublic forums. The policy of official neutrality with respect to political controversies or policy disputes, which the Court in *Greer* said the military authorities at Fort Dix "were constitutionally free to pursue" (424 U.S. at 839), is equally applicable in the civilian workplace. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. at 564-565.

The court of appeals agreed that the government has a legitimate interest in avoiding the fact or appearance of supporting advocacy groups; however, it disagreed with the President's judgment that the exclusion of respondents and other legal defense funds would advance that interest (Pet. App. 25a).[34] In the court's view, respondents' tax exempt status indicated that they were not engaged in "political advocacy" (*id.* at 25a-26a). But tax exempt status under the Internal Revenue Code serves purposes that are different from the concerns that underlie limitations on Campaign participation. The Internal Revenue Code bars tax exempt organizations from participating or intervening in "any political campaign on behalf of any candidate for public office," or devoting a "substantial part" of their activities to "carrying on propaganda,

[34] The district court suggested (Pet. App. 94a) that the government interest in neutrality could be served by insertion of disclaimers in Campaign materials. This Court has declined to adopt such reasoning in at least one other nonpublic forum case. See *Lehman* v. *City of Shaker Heights*, 418 U.S. at 321-322 (Brennan, J., dissenting). But cf. *FCC* v. *League of Women Voters*, No. 82-912 (July 2, 1984), slip op. 29-30. And, of course, any such disclaimer presumably would be seen only by federal employees, not by those outside the federal workplace.

or otherwise attempting, to influence legislation." 26 U.S.C. 501(c)(3).[35] In limiting participation in the Campaign, however, federal officials are concerned not merely with avoiding government sponsorship of electoral politics; they also seek to preserve government neutrality among groups with competing public policy views. Cf. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745-746 (1978) (opinion of Stevens, J.).

More to the point, the perception that inclusion in the Campaign of a group like the National Right to Work Legal Defense Foundation is motivated by politics will not be dispelled merely by the fact that the organization qualifies for tax exemption under the Internal Revenue Code. As a matter of common sense, inclusion of a right to work organization or any other advocacy group is unlikely to be perceived as a neutral act in view of the government's active sponsorship of the Campaign as a whole. See page 34, *supra*. The record in this case further supports the President's judgment on this score. For example, the AFL-CIO advised its members, in response to the inclusion in the Campaign of the right to work group: "The Reagan Administration has granted yet another opportunity to the far right wing to enrich itself, this time at the expense of federal and postal employees and the needy" (J.A. 92). The President of the International Association of Machinists and Aerospace Workers, which traditionally had supported the Campaign, urged members to withhold support from the 1983 Campaign because, by including the right to work group, "Reagan's appointees have perverted every accepted concept of charity and compassion" (*id.* at 88). Particularly in view of such record evidence, the court of appeals' failure

[35] The regulations governing eligibility for the Campaign refer to tax exempt status as one criterion for eligibility (see 5 C.F.R. 950.101(a)(1)(iii)), but that is only a threshold screening device. Other criteria narrow the eligibility definition further so that it encompasses only the health and welfare charities traditionally included in the Campaign. See 5 C.F.R. 950.101, 950.401 *et seq.*

to defer to the judgment of the President on this matter is wholly unjustified.[36]

3. *Limiting Participation To Traditional Health And Welfare Charities Is Reasonable In Light Of The Availability Of Alternative Channels Of Communication*

The concerns described above, individually and in combination, provide ample support for the conclusion that limitation of Campaign participation to traditional health and welfare charities is reasonable. That conclusion is reinforced by the fact that alternative channels of communication are available to organizations that are not eligible to participate in the Campaign. Nothing in Executive Order No. 12,404 prohibits respondents or other advocacy groups from soliciting contributions directly from federal workers outside the workplace; and, of course, the executive order does not prohibit federal employees from responding to such solicitations. See 5 C.F.R. 950.103(f). Alternative avenues for solicitation of federal employees would include techniques used to attract contributions from other members of the public, *e.g.*, direct mailings, telephone contact, door-to-door solicitation, fundraising rallies or dinners, and media advertisements. The Campaign is undoubtedly a more convenient and less costly method of obtaining contributions than most of these alternatives. But the First Amendment does not require the government to subsidize charitable solicitation. See *Regan* v. *Taxation With Representation*, 461 U.S. at 545-546.

The court of appeals asserted, without citation of authority, that "the availability of alternative forums has never been considered to justify Government attempts to

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[36] The court of appeals' failure to accord deference to the President's judgment is especially inappropriate in view of the posture of this case. Since the case was decided on respondents' motion for summary judgment, evidence relating to the reasonableness of restrictions on Campaign participation should be viewed in the light most favorable to the government.

'pick and choose' among preferred speakers" (Pet. App. 36a). But this Court has made clear that the availability of such alternatives *is* relevant to determination of the reasonableness of a restriction on expression in a nonpublic forum. In *Perry* the Court concluded that limitations on a union's access to the school mail system were reasonable in part because of "the substantial alternative channels that remain open for union-teacher communication to take place," including bulletin boards, meeting facilities, and the United States mail. 460 U.S. at 53. And in *Greer* v. *Spock*, 424 U.S. at 839, the Court found it significant in evaluating restrictions on on-base expressive activities that servicemen were free to attend political rallies off base. See also *Pell* v. *Procunier*, 417 U.S. 817, 827-828 (1974) (noting that prison inmates could communicate with the media by mail and through visitors).

4. *The Court Of Appeals' Conclusion That Limiting The Campaign To Traditional Health And Welfare Charities Is Unreasonable Resulted From Application Of An Inappropriately High Level Of Scrutiny*

The court of appeals' rejection of the President's distinction between traditional health and welfare charities, on the one hand, and advocacy groups, on the other, appears to be due in part to its application of an unduly exacting standard of scrutiny. The extent of the court of appeals' departure from this Court's nonpublic forum precedents is confirmed by the sharp distinction it drew between what it viewed as the proper standard and what it termed the "rational basis" test applied by the dissent (see Pet. App. 38a).

We are puzzled by the distinction the court of appeals purported to draw between the "reasonableness" standard applicable to restrictions on access to nonpublic forums under *Perry* and a "rational basis" test. Normally these two terms are used interchangeably, at least in this context. See *e.g.*, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 134-136; *City of Charlotte* v.

Local 660, International Ass'n of Firefighters, 426 U.S. at 286-289. In determining whether a restriction on access to a nonpublic forum is reasonable, the Court generally has looked to whether there was a rational basis for the restriction.[27] Moreover, as Judge Starr recognized (Pet. App. 44a, 56a-59a), it is clear that this Court, in undertaking the "reasonableness" inquiry, has accorded considerable deference to the judgments of government officials concerning the need for restrictions on access to a nonpublic forum. The Court has declined to require public officials to demonstrate that the government has a significant interest in excluding a particular group from a nonpublic forum. See, *e.g.*, *Perry*, *supra* (one union's status as exclusive bargaining representative was sufficient to justify exclusion of rival union from access to school mail facilities). See also Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 Stan. L. Rev. 121, 127-131 (1982); Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287, 1303 (1979). The Court has never suggested that it would require government officials to show more than a rational basis for their judgments restricting access to a nonpublic forum.

The court of appeals justified its heightened scrutiny in part on the basis of its finding that respondents were

[27] In *Perry* the Court noted that the school district's policy of restricting access to the interschool mail system "need only rationally further a legitimate state purpose" (460 U.S. at 54). And in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.* the Court stated (433 U.S. at 134):

> A prison may be no more easily converted into a public forum than a military base. Thus appellants need only demonstrate a rational basis for their distinctions between organizational groups.

These statements were made in the context of discussions of equal protection challenges to the access restrictions at issue in *Perry* and *Jones*. But the Court did not suggest in either case that the applicable equal protection standard was significantly different from the standard it applied in rejecting the First Amendment challenge also presented in each case.

similarly situated to organizations that had been found eligible to participate in the Campaign.[28] The court of appeals noted (Pet. App. 20a-21a) that in *Perry* this Court concluded that exclusion of one union from access to the interschool mail system was reasonable in part because there was a difference in the status of two rival unions, *i.e.*, the union that was given access had been chosen as the exclusive bargaining representative of the teachers employed by the school district. The court of appeals here found it equally significant that both respondents and the organizations that participate in the Campaign qualify for tax exempt status under Section 501(c)(3) of the Internal Revenue Code. But as Judge Starr noted (Pet. App. 59a), this Court has not generally insisted that groups excluded from a nonpublic forum have a "status" different from that of those admitted to the forum. The difference in legal status presumably was significant in *Perry* because the two unions were alike in other respects. In this case, however, the President has not attempted, *e.g.*, to treat one emergency relief charity differently from another; rather, he has distinguished between two types of groups that differ in fundamental respects, apart from their legal status. See pages 31-37, *supra*.

In any event, the court of appeals erred in concluding that respondents' tax status would rebut any justification for excluding them from the Campaign. Organiza-

[28] The court of appeals also appears to have concluded that strict scrutiny was appropriate because of what it perceived as the "vacillat[ing]" official explanations for the restriction (Pet. App. 24a; see also *id.* at 42a). Much of the "vacillation" the court perceived amounts merely to differences in emphasis depending on the particular context in which petitioner was speaking at different times. Of course, it is not surprising that federal officials would discuss a variety of theories and formulations in the course of developing proposals for executive action. It is the President who ultimately decided to issue Executive Order No. 12,404, not petitioner. The executive order itself, rather than any preliminary statements by administrators, is the most authoritative statement of the President's reasons for deciding to return the Campaign to its original scope.

tions that qualify for tax exempt status are by no means uniform in terms of the services they perform. And as we explained above (see pages 42-43, *supra*), although tax exempt status shows that a group does not devote extensive resources to electoral politics and lobbying, it does not bar the group from engaging in other advocacy activities.[39]

The court of appeals also questioned the distinction drawn by the President because, in the court's view, respondents' efforts were more likely to result in health and welfare services to the needy than the activities of some of the groups OPM had declared eligible for Campaign participation in the fall of 1982. Pet. App. 22a. The court noted in particular the inclusion of the National

[39] The court of appeals' focus on tax exempt status suggests that any tax exempt organization, presumably including churches, schools, and a variety of other groups, could claim a constitutional right to be included in the Campaign. The 1983 Annual Report of the Commissioner and the Chief Counsel for the Internal Revenue Service 64, Table 20, states that over 300,000 organizations are listed as tax exempt under 26 U.S.C. 501(c)(3). (This figure does not include churches, which need not apply for an exemption.) Inclusion of all such organizations in the Campaign would result in a substantial administrative burden on the government and would require administrative changes that would be likely to evoke strong protests from both federal employees and participating groups (as has been the experience of the Campaign held during the fall of 1984, see Washington Post, Sept. 20, 1984, at A17, col. 3). Moreover, such an expansion would change the nature of the Campaign significantly. Rather than itself determining the focus of the charitable drive it sponsors, the federal government would act merely as a publicity and collection agent for all tax exempt organizations.

The court of appeals rejected the government's contention that it was reasonable to restrict the Campaign to traditional health and welfare charities because inclusion of additional groups would result in an unmanageable number of participants. The court suggested that if the government felt a need to restrict the number of participants it could use, *e.g.*, a first-come, first-served system. Pet. App. 35a. Of course, that approach, too, would change the nature of the Campaign significantly and, in our judgment, would drastically reduce the likelihood that federal employees would support the Campaign enthusiastically.

Parks and Conservation Association, the United States Olympic Committee, the Wilderness Society, and the National Recreation and Park Association. Because respondents did not call attention to the inclusion of these organizations at the district court stage, the record does not indicate what evidence the organizations presented to convince federal officials that they met the direct health and welfare services criterion.[40]

It is possible that inclusion of the organizations cited by the court of appeals reflected a misapplication of the direct health and welfare services criterion. But that would not affect the facial validity of the criterion itself, which is the issue in this case.[41] There will often be difficulties in determining the precise boundaries of broad categories, and officials may sometimes err in considering

[40] If the government had had occasion to submit evidence concerning the organizations singled out by the court of appeals, it would have shown, *e.g.*, that the United States Olympic Committee supplied federal officials with materials indicating, inter alia, that it encourages and supports research in medicine and safety, as well as amateur athletics among the handicapped and minorities.

Such organizations may have been included because earlier guidelines seemed to suggest that the Campaign traditionally had included at least some groups that offered recreational services (see *Manual on Fund-Raising Within the Federal Service* §§ 3.1c, 4.2e) or because the organizations did not appear so clearly cause-oriented as respondents. But see *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign*, *supra*, at 68 (statement of Donald J. Devine) (suggesting that sports associations and recreation societies traditionally had not been regarded as appropriate Campaign participants).

[41] The district court viewed this case as raising a facial challenge to the exclusion of advocacy groups under Executive Order No. 12,404. See Pet. App. 88a. In their complaint (¶ 16), respondents stated that "the Executive Order in fact authorizes the rejection of [respondents'] applications * * *, then it violates the First Amendment on its face" (J.A. 13).

Of course, if respondents themselves were properly excluded under valid eligibility criteria, they can hardly contend that they nevertheless should be admitted to the Campaign simply because federal officials erred in applying the criteria to several other groups.

borderline cases. Such difficulties could be avoided if, *e.g.*, federal officials simply limited participation in the Campaign to ten charities they believed would provide the maximum amount of direct health and welfare services as a result of employee contributions. However, the President has chosen to define eligibility in terms of broad categories, thereby both expanding the choices available to federal employees and retaining the concept of a focused Campaign. The latter approach ultimately must be more compatible with First Amendment values, since it avoids the need for federal officials to pick and choose among individual charities. While the difficulty of defining precise categories may lead to some uncertainty, the First Amendment surely affords some leeway for public officials to elect such general standards over a case-by-case evaluation of the worthiness of individual groups in determining access to a nonpublic forum.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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